THE HON'BLE MR JUSTICE P.S.NARAYANA

WRIT PETITION NO: 19174 OF 2007

Dated:18.12.2007

Between:

D.B.Chandrasekhar Rao.

..... PETITIONER

AND

Indian Bank.

.....RESPONDENT

THE HON'BLE MR JUSTICE P.S.NARAYANA

WRIT PETITION NO : 19174 OF 2007

ORDER:

1. Heard Smt. Ch.Vedavani, the learned counsel representing the writ petitioner and Sri P.Bhaskara Mohan, the learned counsel representing the respondent-bank.

2. This Court ordered Notice Before Admission on 11.09.2007 and granted interim stay for a limited period, which is being extended for further limited periods. W.P.M.P.No.2706 of 2007 is filed to vacate the interim order.

3. The present writ petition is filed for a writ of Mandamus or any other appropriate writ, to call for the records of the respondent pertaining to the petitioner account and declare the action of the respondent in issuing the notice under Section 13(2) under SERFAESI

Act, 2002 (for short 'the Act') as unlawful, without jurisdiction and contrary to Section 13(2) and (4) of the Act and consequently, set aside the notice, dated 21.08.2007 issued under Section 13(4) of the Act.

4. Smt. Ch. Vedavani, the learned counsel representing the writ petitioner would maintain that the total loan amount was never paid to the writ petitioner by the respondent-bank and hence, the question of commencement of the payment in installments would not arise. The learned counsel also would maintain that the flat is a semi-finished one and the respondent-bank is acting against the terms and conditions. She also made elaborate submissions in relation to the fact that the loan was never declared as NPA and the respondent-bank is bound by the guidelines issued by the Reserve Bank of India from time to time. The learned counsel also would maintain that when the loan is not declared as NPA at all, the respondent-bank has no authority or jurisdiction to make such a demand.

5. Per contra, Sri P.Bhaskara Mohan, the learned counsel representing the respondent-bank had taken this Court through the contents of the counter affidavit and would maintain that the petitioner is having an effective alternative remedy by invoking the provisions of the Act and hence, the writ petition itself is not maintainable. Learned counsel also placed reliance on Finalization of Accounts and Audit of the Bank and Appendix IV-Prudential Norms on Income Recognition, Asset Classification and Provisioning Pertaining to

Advanced-Master Circular issued by the Reserve Bank of India and would maintain that inasmuch as the procedure has been perfectly followed by the respondent-bank, the petitioner is not entitled to file the present writ petition.

6. It is stated that the petitioner purchased semi finished flat No.B.508, Tuljabhavani Towers, Mettugud, Secunderabad from M/s. Shilpa Homes, a partnership firm represented by its Managing Partner Sri P.V.S.N.Murthy through a registered sale deed bearing document No.1490/03 by paying total consideration of Rs.4,60,000/-, as per the sale deed. Thereafter, the petitioner entered into a separate agreement for completion of the said semi finished flat with the said M/s. Shilpa Homes for a total consideration of Rs.8,00,000/-. The builder under the said agreement was to complete the finishing of the said flat within the period specified therein. The said builder advised the petitioner to apply for housing loan to Indian Bank, with whom his project was approved for the disbursement of the housing loan to the prospective purchaser. Accordingly, the petitioner applied to the respondent-bank for sanction of the housing loan, for the said amount.

7. It is further stated that the respondent-bank sanctioned the petitioner a term loan of Rs.10,00,000/- vide its loan deed dated 16.07.2003. As per the terms and conditions, the said term loan was to be disbursed in 3 or 4 installments and according to the stage of completion of the said semi finished flat, the payments

were to be released in 3 or 4 installments.

8. It is averred that as per the agreement for the completion of the said semi finished flat, the final installment of the said term loan was to be paid only on completion of the work for the said flat and on issuance of the work competition certificate by the builder and that the repayment of the said term loan was to be made, only after the total disbursement of the loan amount. However, the respondent-bank neither disbursed any amount to the petitioner in installments nor paid any amounts to the builder in installments under petitioner's authorization or under intimation to the petitioner. Therefore, the petitioner was under impression that the respondent-bank has not disbursed any amount, as the said semi finished flat was not at all finished by the said builder and the petitioner was pursuing the matter with the builder regarding the completion of the said work and the builder was promising to complete the said work within a short period of time. While the matter stood thus, the petitioner came to know through his friend that the respondent-bank has affixed a notice on the said flat on 21.08.2007 stating that the petitioner committed default in repaying the said term loan, which is purportedly disbursed by the respondent-bank, though the said flat remained unfinished. According to the said notice, the said flat has been taken possession by the bank.

9. It is further stated that the petitioner approached the respondent-bank and made a representation to stall the proceedings and requested to

grant him 15 days time to represent in the said matter. However, the respondent-bank did not consider the representation and demanded the petitioner to pay a sum of Rs.2,00,000/-. Aggrieved by the same, the petitioner filed the present writ petition.

10. It is also averred that no notice is served on the petitioner as has been mandated under Section 13(2) of the Act by the respondent-bank, before it resorted to take action under Section 13(4) of the Act and that though the respondent-bank only sanctioned the term loan of Rs.10,00,000/-, it has not disbursed the said loan amount either to the petitioner or to the said builder under intimation to the petitioner. Therefore, the question of repayment of the said term loan does not arise and consequently, it cannot be said that the said term loan has become NPA, so as to warrant the issuance of the statutory notice under section 13(2) of the Act.

11. It is further stated that even till date, the said builder has not completed the semi finished flat and therefore, the respondent-bank has no occasion to disburse the said term loan contrary to the terms of the sanction letter. Therefore, it is apparent that the respondent-bank colluded with the builder to the detriment of the petitioner's interest and therefore, by any stretch of imagination, the petitioner cannot be held liable for such illegal and unlawful purported disbursal of the term loan. Being left with no other option, the writ petitioner approached this Court by filing the present writ petition, raising the following grounds:

a) The respondent ought to have seen that it was the case of the petitioner that no disbursal of the term loan has been made to the knowledge of the petitioner either to the petitioner or the builder and therefore it was incumbent upon the respondent to give an opportunity to have decided the said issue of fact.

b) The respondent ought to have seen that the question of repayment of the said term loan would arise only when it has been proved that the said term loan was disbursed in the absence of disbursement to the petitioner and the respondent has not jurisdiction to issue the notice under Section 13(2) of the Act.

c) Section 13(2) of the Act mandates that any borrower who is under liability to the secured creditor under a security agreement makes any default in repayment of secured debts or any installment thereof and his account in respect of such debt is classified by the secured creditor as non performing assets then the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section.

d) Rule 3 of Act stipulates that the demand notice under Section 13(2) shall be served on the borrower by registered post acknowledgment due.

e) It is apparent from the above that when Section 13(2) is read with Rule 3 of the Act every notice under Section 13(2) must be sent by registered post acknowledgment due and only when it is so sent, it can be deemed or said that the procedure under the Act is complied with. And only on such compliance confers right on the secured creditor to resort to the powers conferred under Section 13(4) of the said act like taking possession and management of the

security, bringing it to sale and realizing sale proceeds for appropriating against the NPA of the particular borrower. In other words, all the coercive measures contemplated under Section 13(4) of the Act shall be null and void ab initio if it cannot be said that notice under Section 13 (2) is served on the borrower in a given case.

f) The said notice under Section 13(4) does not mention the date of disbursal of the said term loan either to the petitioner/borrower or to the builder. Unless the date of first installment disbursal is known to the petitioner/borrower he will not be in a position to know the first date of repayment for the said loan and in the absence of such information it cannot be said or held that the petitioner/borrower has defaulted in making repayment and therefore his account has become NPA. If such information cannot be attributed to the petitioner/borrower then there arises no occasion to issue notice under Section 13(2) which mandates that only in case of NPA loans notice under Section 13(2) is permissible to be issued. Therefore presuming without admitting for the sake of argument that the notice under Section 13(2) has been received by the petitioner/borrower still the same would be invalid in view of the fact that no date of disbursal is discernible from the notice which goes to the root of the matter and in view of that the very issuance of notice under Section 13(2) becomes without jurisdiction therefore null and void.

12. In the counter affidavit filed by the Authorized Officer of the respondent-bank, the averments are denied. In reply to paragraph 3 of the affidavit, it is stated that it is true that the sale deed was executed on

17.07.03 between the said parties and the sale consideration was Rs.4,60,500/-. Of this amount, Rs.35,500/- was already paid. Rs.4,25,000/- was paid through pay order No.686446 dated 16.07.2003 issued by Indian Bank, Begumpet Branch being part of the proceeds of the loan sanctioned to the party. The total loan sanctioned was Rs.10,00,000/-. Necessary loan documents were executed on 16.07.2003.

13. In reply to paragraphs 4 and 5, it is stated that there is a separate agreement between the said parties dated 26.06.2003. As per the said agreement, the cost of the semi finished flat is Rs.4,75,000/- and the cost of completion is Rs.8,00,000/-. It is further stated that it is true that the loan of Rs.10,00,000/- was sanctioned on 16.07.2003. As per the documents executed, the borrower D.B.Chandrasekhar Rao has executed one Disposal of Proceeds Letter, authorizing the bank to pay the loan amount to M/s. Shilpa Homes. The question of instalments were not mentioned anywhere. As per this authorization the Bank has issued a BPO on 24.07.2003 for Rs.5,25,000/- to M/s. Shilpa Homes.

14. In reply to paragraphs 6,7 and 8, it is stated that the second installment of term loan of Rs.5,25,000/- was paid to Shilpa Homes with the consent of the borrower i.e. the petitioner herein. The repayment has started thereafter and the borrower has paid the installments, as evident from the statement of accounts.

As the second installment of Rs.5,25,000/- was paid with the consent of the petitioner and as he has already paid some installments, he cannot say now that he is not aware of the total disbursements. The Bank has taken possession of completely constructed flat and the borrower now cannot say that the construction is incomplete. It is averred that no such representation was given to the Bank.

15. In reply to paragraph 9, it is stated that the notice under the Act was served on the petitioner and the same was also published in newspapers. They are unable to say anything about the served notice, as they are unable to trace the acknowledgment or the returned envelope containing the notice. The paper publication copies are enclosed.

16. In reply to paragraph 10, it is stated that having consented for payment of the amount to the builder and got paid the loan amount, the petitioner cannot take the plea that even till date, the said builder has not completed the said semi finished flat and therefore, the respondent-bank has no occasion to disburse the said term loan contrary to the terms of the sanction letter. It is a false allegation that the Bank colluded with the builder and the petitioner is liable to face criminal prosecution for the offence of defamation under the Indian Penal Code.

17. Further allegations also had been specifically denied. In reply to the grounds stated in the

affidavit, it is stated that the petitioner having given consent to the respondent-Bank is playing a foul game and also playing fraud on this Hon'ble Court by filing a false affidavit. He is put to strict proof of all his allegations. Since the flat was already taken possession, it is false to say that the construction is not completed. The Bank has strictly complied with the provisions of the Act. There is no violation of any of the provisions of the said Act by the respondent herein. The material papers filed herewith by the respondent speak themselves about the case of the petitioner and also the default made by him. It is unfortunate that after enjoying the Bank's funds, the petitioner has resorted to play a foul game by alleging that without his notice the money was disbursed to the builder in spite of the fact that he has given consent for the disbursement of the loan amount. It is also stated that the writ petition is not maintainable, since the Act provides for an appeal before the DRT and without exhausting the statutory channel for redressal of grievances, the petitioner approached this Court. Certain other facts had also been narrated and the relevant material papers had also been enclosed.

18. In the light of the respective stands taken by the parties, the question that has to be decided is that in the facts and circumstances of the case, whether the

writ petitioner is entitled for the relief prayed for in the writ petition.

19. In the light of the material produced before this Court, this Court is satisfied that the procedure contemplated by the Act has been followed by the respondent-bank. Even otherwise, the writ petitioner is having an effective remedy by way of appeal under the provisions of the Act. Therefore, this Court is not inclined to go into several of the factual controversies between the parties. Liberty is given to the writ petitioner to invoke the appropriate appellate remedy, if he is so advised.

20. With the above observations, the writ petition is dismissed. No order as to costs.

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(P.S.NARAYANA,J)

Date: 18.12.2007
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THE HON'BLE MR JUSTICE P.S.NARAYANA

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